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In The

Supreme Court of the United States

October Term, 1996

HOUSTON BROKERAGE, INC., HOUSTON INSURANCE BROKERAGE CENTER, AND MIKE PINKERTON, INDIVIDUALLY AND AS AN OFFICER DIRECTOR OF HOUSTON BROKERAGE, INC., AND HOUSTON INSURANCE BROKERAGE CENTER,

Petitioners,

v.

NATHAN McDONALD AND SHARYL McDONALD, INDIVIDUALLY, AND AS NEXT FRIEND AND GUARDIANS OF NATHAN NEIL McDONALD, A MINOR, AND J.N. McDONALD, JR., INDIVIDUALLY AND D/B/A McDONALD EQUIPMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether ERISA's preemption clause precludes state law claims, unrelated to the administration of employee benefit plans, against an insurance broker.

PARTIES TO THE PROCEEDING

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Houston Insurance Brokerage
Center, and Mike Pinkerton,
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STATEMENT OF JURISDICTION

Respondents invoke the jurisdiction of this Court "[B]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 15, 1989, Nathan Neil McDonald, a four year old boy, sustained a near drowning injury which rendered him a spastic quadriplegic. In 1986, through Business Insurance Trust ("BIT"), McDonald Equipment Company, a sole proprietorship owned by J.N. McDonald, a Plaintiff in this case, purchased health insurance for himself and his employees from North Carolina Mutual. Employees handled the filing of their own claims. Mr. McDonald and his son, Nathan McDonald, had nothing to do with the payment of or administration of claims. North Carolina Mutual and the McDonald's contract provided for the use of eight class factors to set premiums.

In 1988, the BIT replaced the insurance policy issued by North Carolina Mutual with another policy provided

by Provident Indemnity Life Insurance Company. Shortly thereafter, Houston Brokerage Incorporated, ("HBI"), a non-fiduciary insurance broker, that marketed BIT, represented to McDonald Equipment's insurance agent, Bob Jaffe, that the policies issued by North Carolina Mutual and Provident Indemnity were substantially the same, when in fact, they were not.

Within a period of eighteen months after the accident, Provident Indemnity raised McDonald Equipment's premium rates from $2,000 per month to over $15,000 per month. McDonald Equipment, unable to afford these outrageous premiums, was forced to cancel its subscription to the BIT, leaving Nathan McDonald without medical insurance for his injured son.

REASONS WHY THIS COURT SHOULD NOT GRANT CERTIORARI

I. THE SUPREME COURT'S ANALYSIS OF ERISA OFFERS UNEQUIVOCAL GUIDANCE TO LOWER COURTS.

This is not a case of first impression before this Court. Previously, this Court has ruled on numerous cases concerning ERISA and has written explicit, voluminous decisions offering guidance on preemption of State law claims. Beginning with the decision presented in *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890 (1983), this Court offers simple, unequivocal analyses of ERISA:

> The federal Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended 29 U.S.C. § 1001 et seq. (1976 ed. and Supp. V),

> subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.

Shaw, 103 S.Ct. at 2896.

The enforcement section of ERISA, section 514(a) states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan as described in section 1003(a) of this title and not exempted under section 1003(b) of this title.

29 U.S.C.A. § 1144(a) 1985.

In *Shaw*, this Court examined whether New York State Laws (the Human Rights Law and Disability Benefits Law) were related to ERISA under § 514(a), and if so, were they preempted. This Court held that "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw*, 103 S.Ct. at 2900. This Court concluded that the Human Rights Law, which "prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy" was clearly preempted by § 514(a) of ERISA. Relying on the Black's Law dictionary, this Court defined "relate" as, "[T]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with" *Shaw*, 103 S.Ct. at 2900, fn. 16. The Court was careful to point out that "some state actions may affect employee

benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the plan." *Shaw*, 103 S.Ct. at 2901. There is no confusion or equivocation in the *Shaw* ruling. This case instructs lower courts and state legislatures that ERISA will preempt state laws that cause conflicting restraints between the States on employee benefit plans.

This Court revisited ERISA in *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380 (1985). This case dealt with a Massachusetts statute which set guidelines for mandatory minimum mental-health-care benefits. One of the issues of the case was whether these guidelines were preempted by ERISA. While this Court found that ERISA did preempt the statute, the Court was careful to point out that, "The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope." *Metropolitan*, 105 S.Ct. at 2390. The Court, in dismissing Appellant's argument, offered a clear map of its ERISA analysis when it stated:

> Appellants assert that state laws that directly regulate the insurer, and laws that regulate such matters as the way in which insurance may be sold, are traditional laws subject to the clause, while laws that regulate the substantive terms of insurance contracts are recent innovations more properly seen as health laws rather than as insurance laws, which § 514(b)(2)(A) does not save. This distinction reads the saving clause out of ERISA entirely, because laws that regulate only the insurer, or the way in which it may sell insurance, do not "relate to" benefit plans in the first instance. Because they would

> not be pre-empted by § 514(a), they do not need to be "saved" by § 514(b)(2)(A). There is no indication that Congress could have intended the saving clause to operate only to guard against too expansive readings of the general pre-emption clause that might have included laws wholly unrelated to plans.

Metropolitan, 105 S.Ct. at 2390.

This decision instructs lower courts to recognize that "relates to" is not to be used as some type of legal napalm that sticks to every state law that is even remotely related to employee benefit plans. In simple terms, ERISA pre-empts state laws that conflict with its legislative intent of providing uniformity between state employee benefit plans.

In *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987), this Court further clarified its position on ERISA preemption. The issue in this case was whether ERISA pre-empted a state common law tort and contract cause of action for improper processing of benefits under an employee benefit plan. The Court found that these laws were in conflict with the substantive laws put forth in ERISA. As such they were clearly preempted. This Court went to great lengths to explain how this decision is consistent with its previous decisions:

> In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 746, 105 S.Ct., at 2393, this Court rejected an interpretation of the saving clause of ERISA's express pre-emption provisions, § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), that saved from pre-emption "only state regulations unrelated to the substantive provisions of ERISA," finding that "[n]othing in the language,

> structure, or legislative history of the Act" supported this reading of the saving clause. Metropolitan Life, however, did not involve a state law that conflicted with a substantive provision of ERISA. Therefore the Court's general observation -- that state laws related to ERISA may also fall under the saving clause – was not focused on any particular relationship or conflict between a substantive provision of ERISA and a state law. In particular, the Court had no occasion to consider in Metropolitan Life the question raised in the present case: whether Congress might clearly express, through the structure and legislative history of a particular substantive provision of ERISA, an intention that the federal remedy provided by that provision displace state causes of action. Our resolution of this different question does not conflict with the Court's earlier general observations in Metropolitan Life.

Pilot, 107 S.Ct. at 1558.

Once again the decision offers clear guidelines to the lower courts. In this case, the state laws specifically dealt with the processing of claims. These laws should be preempted by ERISA otherwise employers would face different rules for claims processing in each state.

This Court illustrated that ERISA's preemption clause is not omnipotent in *Mackey v. Lanier Collection Agency & Service, Inc.*, 108 S.Ct. 2182 (1988). There the court found that a State's general garnishment statute was not preempted by ERISA.

> In our view, however, certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid

> the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants *832 from receiving their benefits. Consequently, we join the virtually unanimous view of federal and state courts which have faced this question, and hold that federal law does not bar a garnishment action like respondent's.

Mackey, 108 S.Ct. at 2186.

This view is contrasted with and explained in *Ingersol -Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990), "[In *Mackey*] the Court held that ERISA did not pre-empt a State's general garnishment statute, even though it was applied to collect judgments against plan participants. The fact that collection might burden the administration of a plan did not, by itself, compel pre-emption. Moreover, under the plain language of § 514(a) the Court has held that only state laws that relate to benefit plans are pre-empted."

The Court went on to explain:

> Neither of these limitations is applicable to this case. We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. Nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself.

Ingersol-Rand, 111 S.Ct. at 483.

The Court consistently and clearly explains to lower courts that only state laws which relate to employee benefit plans are preempted by ERISA and that the link cannot be too tenuous.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995), this Court held that New York statutes imposing surcharges in hospital rates for patients whose insurance is through ERISA covered plans were not preempted by § 514(a). In the course of its decision this Court explained its previous decisions and pointed out that the basic thrust of the preemption clause is to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 115 S.Ct. at 1677-78. This analysis provides a strong foundation upon which lower courts may base their decisions.

II. VARIATIONS IN LOWER COURT DECISIONS ARE PURSUANT TO FACTUAL DIFFERENCES, NOT DIFFERING INTERPRETATIONS OF ERISA § 514(a)

The fact that appellate courts have preempted some state laws while exempting others is no more grounds for granting certiorari than finding snow in Antarctica is cause for surprise. The very reason for the existence of the judiciary and this Court is that law is not a precise science, but instead an exercise in carefully weighing a multitude of elements in order to provide justice. Petitioner argues that some jurisdictions hold that claims against insurance agents and brokers are preempted. Each of the three cases that petitioner cites as evidence of

appellate court confusion support respondent's position that the appellate courts are readily able to follow this Court's decisions concerning ERISA preemption. Petitioner cites *Finn v. Nachreiner Boie Art Factory*, 549 N.W.2d 273 (Wis.App. 1996), *cert. denied*, 117 S.Ct. 508 (1996) as evidence of a court that has difficulty in understanding ERISA preemption. This case concerns fraud and misrepresentation regarding benefits under an ERISA plan.

> The April 1, 1984 agreement between Mr. Nachreiner and the Art Factory stated: "This Agreement is intended to qualify as a life insurance employee benefit plan. . . . " Additionally, the agreement stated that it is "intended to meet the requirements of Employee Retirement Income Security Act of 1974." Consistent with those requirements, the agreement designates a plan "fiduciary" and establishes a claims procedure for resolving disputes over benefits due under the Agreement.

Finn v. Nachreiner, 549 N.W.2d at 275.

The court was correct in preempting this case since it concerned the wording and responsibilities of the parties under the specific ERISA agreement. As evidenced by the fact that this Court denied certiorari, this holding is correct and consistent with established case law.

The next case cited by petitioner, *Johnson v. Reserve Life Ins. Co.*, 761 F.Supp. 93 (C.D.Cal. 1991), is an exemplary example of a district court that understands this Court's analysis of ERISA preemption. The district court in this case correctly followed this Court's guidance and separated preempted ERISA claims from state law claims outside ERISA's scope. The plaintiff claimed that her

benefits were wrongfully terminated and that she has not received continuation coverage or conversion to an individual policy. The district court recognized that the part of the claim that dealt with conversion of her ERISA plan was preempted by § 514(a). The court, however, maintained that the state law claims for negligence arising from the individual actions of the defendant were not preempted by ERISA.

> In the present case, plaintiff alleges that Foy undertook a duty to help protect plaintiff's interests and negligently breached that duty. Thus, to the extent plaintiff is claiming a breach of duty by Foy apart from the administration of the ERISA plan, preemption may not be appropriate. However, the language of the cases does suggest that plaintiff's claims are preempted to the extent the claims refer to an ERISA plan or would not exist absent the plan.

Johnson, 761 F.Supp. at 95.

The final case cited by petitioner, *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir.1992) clearly involves an ERISA claim. Plaintiffs brought a cause of action alleging improper management concerning the conversion of their employee benefit plan. This case dealt with an improper calculation of a termination and conversion date of a plan.

> Lincoln National sent Patrick a letter on August 25, 1983, attaching conversion information and stating that "your group coverage terminates August 31, 1983." On August 26, 1983, Marcia Greany went into premature labor and delivered a two pound seven ounce baby girl who had a hole between her main pulmonary artery and

> her aorta. The Greanys incurred approximately $62,000 in medical expenses associated with the child's premature birth and subsequent medical care. Patrick contacted Lincoln National on August 29, 1983, to inform the insurer of his daughter's premature birth. A Lincoln National agent confirmed that the Greanys were covered under the group plan until August 31, 1983. However, the Greanys' expectation of coverage through August 31, 1983, abruptly evaporated. Lorna Young, a Farm Bureau employee, contacted Lincoln National on September 2 and 9, 1983, to inform Lincoln National that an incorrect date had been used by Lincoln National in evaluating the Greanys' coverage under the group plan.

Greany, 973 F.2d at 815.

Each of the cases that petitioner cites as examples of jurisdictions that allow ERISA preemption prove only that there is no reason to grant certiorari in this case. Petitioner, through their own case law, establishes that lower courts do not require further guidance from the Supreme Court concerning this aspect of the law.

III. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT ERISA DOES NOT PREEMPT THE STATE COURT CLAIMS IN THIS CASE

On July 11, 1996 the Court of Appeals, Thirteenth Supreme Judicial District of Texas, Corpus Christi reversed and remanded a trial court summary judgment in favor of petitioners. Defendant, Houston Brokerage Inc., moved for summary judgment on three separate

grounds; res judicata, collateral estoppel and ERISA preemption. The appellate court examined each of these theories of relief and found them each inadequate to properly grant summary judgment.

RES JUDICATA

Defendants base their res judicata claim on the existence of a preceding federal case, *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234 (5th Cir.1995). In that case:

> [T]he same plaintiffs sued Provident Indemnity, the BIT (Brokerage Insurance Trust), and the BIT's trustee in the U.S. District Court for the Southern District of Texas, asserting various Texas state law claims, as well as alternative ERISA claims for breach of fiduciary duty . . . Following a bench trial on the remaining ERISA claims, the district court entered judgment in favor of the defendants. On August 9, 1995, the Fifth Circuit affirmed the district court's rulings.

McDonald, 928 S.W.2d at 635.

Recognizing that federal law concerning res judicata is controlling in this case, the court applied the correct test. *McDonald*, at 636. "Under federal law, the doctrine of res judicata will apply if: (1) the parties are identical in both suits; [FN1] (2) the prior judgment is rendered by a court of competent jurisdiction; (3) there is a final judgment on the merits; and (4) the same cause of action is involved in both cases." *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir.1983). Defendants argue that although they were not parties to the original suit, res judicata is still applicable since they were in privity with

the original parties. The appellate court carefully points to defendants' contradictory arguments in footnote 2 of the opinion.

> Curiously, earlier in their motion, HBI and Pinkerton distance themselves from the transaction, which they now attach themselves to as privies, by stating that their "sole involvement in this case was as a facilitator between the soliciting agent, Robert Jaffe, and the insurance company in question, Provident, regarding McDonald Equipment Company's enrollment forms and other application materials that were required to procure the insurance in the beginning."

McDonald, 928 S.W.2d at 636.

Noting the blatant contradiction in their pleadings, the court found that HBI was not in privity to the parties in the federal lawsuit. The court found that Provident Indemnity and French, the defendants in the federal suit, were not standing in the shoes of HBI and their interests were not aligned with HBI. Thus, this Court need not further review this issue.

COLLATERAL ESTOPPEL

The court next considered and dismissed appellant's second argument; that collateral estoppel provides proper grounds for summary judgment relief. The appellate court carefully considered the elements of collateral estoppel.

> A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those

> facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Sysco Food Serv. v. Trapnell*, 890 S.W.2d 796, 801 (Tex.1994) [FN3]; *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex.1991); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 820 (Tex.1984).

McDonald, 928 S.W.2d at 637.

Upon examining the elements of the claim, the court found that the facts did not support a collateral estoppel claim. The previous lawsuit pled federal and state law causes of action. The federal claims were for misconduct in the handling and settling of claims while the state claims included fraud, misrepresentation, breach of warranty, breach of contract and deceptive trade practices. The court correctly concluded that collateral estoppel is inappropriate in this case since the claims in question (the state law claims) were not fully and fairly litigated in the federal suit. The federal bench trial did not consider any of the state claims and did not rule on their merits. Since the state law claims were not "fully and fairly" litigated in the federal suit, they cannot form the basis of a collateral estoppel claim.

ERISA PREEMPTION

The appellate court examined defendant's third ground for summary judgment relief and found that ERISA did not preempt the state court claims filed in this case.

The appellate court examined, in great detail, this Court's history in deciding ERISA preemption cases and

correctly concluded that these claims are not the type of claims preempted under § 514(a). The appellate court recognized that although this Court gives a broad interpretation of § 514(a), it did not intend for preemption of "state laws of general applicability which only have a 'tenuous, remote or peripheral' connection with employee benefit plans." *McDonald*, at 638 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1680 (1995); *Shaw*, 103 S.Ct. at 2901 n. 21).

The state law causes of action do not assert any claims against the actual employee benefit plan. "Their claims allege that an insurance broker misrepresented the true cost of a replacement policy that was used to fund the plan, not that the plan itself was improperly administered or should be required to pay certain benefits." *McDonald*, 928 S.W.2d at 638. This court has established that mere indirect economic effects on plans are insufficient to warrant preemption. *Travelers*, 115 S.Ct. at 1679-80 (state law not preempted simply because it has an indirect economic effect on ERISA plans). Moreover, numerous courts from various jurisdictions have held that similar state law claims are not preempted by ERISA.

> Most courts have held that ERISA does not preempt state law claims against non-fiduciaries arising out of the provision of services to ERISA-covered plans. See, e.g., *Airparts Co. v. Custom Benefit Serv. of Austin*, 28 F.3d 1062 (10th Cir.1994) (ERISA does not preempt suit by plan's trustees against an actuarial firm for negligence, implied indemnity, and fraud in connection with plan amendment and the calculation of benefits); *Pappas v. Buck Consultants, Inc.*, 923

> F.2d 531, 540 (7th Cir.1991) (ERISA beneficiaries may bring state law malpractice suits against plan consultants); *Painters Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n. 7 (3d Cir.1989) ("ERISA does not generally preempt state professional malpractice actions"); *Carpenters' Local Union No. 964 Pension Fund v. Granik Silverman*, 1995 WL 378539, 1995 U.S. Dist. LEXIS 8663 (S.D.N.Y. June 22, 1995) (ERISA does not preempt state law claims against plan attorney for malpractice and breach of contract); *Berlin City Ford v. Roberts Planning Group*, 864 F.Supp. 292 (D.N.H.1994) (ERISA does not preempt action against service provider for negligence in the formulation, establishment, and administration of ERISA-covered plans); *Horton v. Cigna Individual Fin. Serv. Co.*, 825 F.Supp. 852 (N.D.Ill.1993) (ERISA does not preempt state law claims against plan consultant for breach of contract, fraud, misrepresentation, and breach of fiduciary duty in connection with the provision of administrative and actuarial services to the plan).

McDonald, 928 S.W.2d at 638.

The appellate court provided extensive case law establishing that state law claims arising out of sale of insurance products are not preempted by ERISA.

> In *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir.1990), for example, the plaintiff sued an insurance agent claiming that the agent fraudulently induced him to surrender his previous medical insurance coverage and elect to participate in an ERISA-covered plan. The court held that the plaintiff's state law fraudulent inducement claim against the insurance agent was not

> preempted because it did not "relate to" an ERISA-covered plan within the meaning of ERISA section 514(a). The court emphasized that the claim did not implicate *639 the plan's administration of benefits or "affect the relations among the principal ERISA entities (the employer, the plan fiduciaries, the plan, and the beneficiaries)." See also *Hardy v. Fisher*, 901 F.Supp. 228 (E.D.Tex.1995) (sponsor's claim alleging that insurance agent violated the Texas Deceptive Trade Practices Act not preempted by ERISA); *Barnet v. Wainman*, 830 F.Supp. 610, 613 (S.D.Fla.1993) (participant's state law negligence and fraud claims against insurance agent not preempted by ERISA); *Ingram v. American Chambers Life Ins. Co.*, 643 So.2d 575 (Ala.1994) (participant's state law fraudulent inducement claim against insurance agent not preempted by ERISA).

McDonald, 928 S.W.2d at 638.

The appellate court correctly grasped the Supreme Court's guidelines for evaluating ERISA preemption cases. The spirit of ERISA is to prevent "conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Travelers*, 115 S.Ct. at 1677 (quoting *Ingersol -Rand*, 111 S.Ct. at 484). In this case the state laws that deal with fraud, misrepresentation, breach of warranty, breach of contract, or deceptive trade practices do not affect the "tailoring of employee benefit plans". These laws are wholly independent of and completely ignore the substance of the ERISA plan in question. Instead, they merely offer state protection for its citizens against dubious business practices. Nowhere, in the language of

ERISA, nor its legislative history does it even suggest that ERISA is intended to preempt a State's rights to enforce fair business practices through its own laws.

CONCLUSION

This case is not about ERISA. This case is about unfair, fraudulent business practices of a defendant. Houston Brokerage, Inc., entered into a simple contract to provide insurance in exchange for monetary consideration. Upon learning of four year old Nathan's accident, the defendant decided that honoring its contract with McDonald was no longer profitable. At that point defendant initiated a series of legal smoke screens and maneuvers calculated to force the Plaintiff to run out of money and abandon their rightful claim. This case is about fraud. The fact that this defendant chose an employee benefit plan as its mechanism of fraud should not provide a federal shield behind which the defendant can hide. This defendant should not be allowed to use the Supreme Court of the United States as a tool in its ongoing attempt to run away from its responsibilities to a child and his family. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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